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Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-712

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN E. KOERNER & CO., INC.
AND IMPERIAL PRODUCTS CORP.,
Petitioners,

v.

PLAINTIFF CLASS REPRESENTATIVES AND
THE PLAINTIFF CLASS,
Respondents,

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION
MDL 414

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

This Petition concerns the settlement of an antitrust class action suit. Following notice to all class members of the proposed settlement and hearing thereon, the district court gave final approval to the settlement. The Court of Appeals for the Third Circuit affirmed.

The Petition presents two questions for review. They are as follows:

1. Did the district court abuse its discretion in approving the settlement of this case?

2. Was the notice of proposed settlement adequate?

STATEMENT REQUIRED BY RULE 28.1

Respondents are class representatives of the plaintiff class, a class of purchasers of corn derivatives products, and include the following class representatives:

Bear Stewart & Corp.
Bodines, Inc.
Cumberland Farms Dairy, Inc., whose parent is Delaware Food Stores, Inc.
Consolidated Packaging Corp.
Eastern Candy Company, Inc.
Food Foundation, Inc.
Golden Quality Ice Cream Company
G. Heileman Brewing Company, Inc.
Health Care Industries, Inc.
Kalva Corp.
Korbro Oil Corp.
Land O'Lakes, Inc., whose partially owned subsidiaries are Norris Creameries, Inc.; Imperial Packaging, Inc.; Imperial, Inc.; and Lakeside Dairy Company
Plantation Confection Company, Inc.
Virnelson Bakery, Inc.

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PLAINTIFF CLASS REPRESENTATIVES AND
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BRIEF IN OPPOSITION OF RESPONDENTS

Pursuant to Rule 27.2(b) of the rules of this Court, RESPONDENTS, plaintiff class representatives and the plaintiff class in the Court below, file this brief in opposition to the Petition for a Writ of Certiorari which seeks to overturn a decision of the Court of Appeals for the Third Circuit affirming the approval of a class action settlement. It is respectfully requested that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petition has been filed on behalf of two objectors to a class action settlement approved by the District Court and affirmed by the Court of Appeals.

These consolidated antitrust actions were commenced in late 1979 and 1980 by more than thirty direct purchasers of corn derivative products on behalf of themselves and a class of more than 35,000 similarly situated direct purchasers. The thrust of the actions was that the twelve defendants, who refine corn into derivative products such as syrup, oil, dextrose and starch, allegedly combined and conspired to fix, raise, maintain and stabilize the prices of corn derivative products.

On March 28, 1980, all actions were transferred by the Judicial Panel on Multidistrict Litigation to the District of New Jersey.

Large amounts of discovery materials relating to the merits of Respondents' claims were reviewed by Respondents' counsel, including voluminous documentary materials voluntarily produced by defendants. In addition, Respondents' counsel interviewed managerial pricing personnel of various defendants and reviewed the record and the extensive discovery developed in a related antitrust suit involving the corn derivatives industry, *Dimmitt Agri Industries, Inc. v. CPC International Inc.*, 679 F.2d 516 (5th Cir. 1982).

Concurrently with the document inspection and witness interviews, settlement negotiations were conducted between counsel for the respective parties and proposed settlements were reached. On April 12, 1983 a hearing was held to determine whether the settlements appeared to be sufficiently fair, reasonable and adequate to justify sending notice thereof to class members and to set a hearing for final approval of the proposed settlements. On April 21, 1983 the court filed its Opinion and Order

establishing a settlement class, preliminarily approving the settlements, directing notice to the class, and setting a hearing for final approval on June 30, 1983.

At the request of certain class members who appeared at the June 30 hearing, the hearing on final approval was continued by the Court to August 17, 1983.

During the interim, the Court afforded counsel for Petitioners the opportunity to review the entire record and the extensive discovery materials assembled by counsel for Respondents. Counsel for Petitioners chose to review only small portions of the material made available.

At the August 17 hearing only three of some 35,000 class members objected to the proposed settlement, rather than exercise their right to opt-out. Two of them, represented by the same counsel, have filed the instant Petition.

Following the hearing, the District Court entered an Order and Judgment finding the settlements fair, reasonable and adequate. The District Court made detailed findings on all the criteria applicable to the question of whether to approve a proposed class action settlement.

The three objectors appealed the District Court's approval of the settlement. By opinion dated August 26, 1985 the Third Circuit affirmed the Order of the District Court.

REASONS FOR DENYING THE WRIT

Nothing in the petition supports the granting of a Writ of Certiorari, and none of the points raised by Petitioners is worthy of review. Far from attempting to delineate the issues that make this case one of jurisprudential importance, the Petition simply reiterates the arguments raised by Petitioners below concerning the merits of the district court's approval of the settlement.

First, the Petition raises no important, unsettled question of federal law. The standards for approval of class action settlements and the requisites of Rule 23(e) notice have been the subject of considerable scrutiny at all levels of the federal court system.

Second, no conflict among the Circuit Courts of Appeals is presented by the Decision of the Third Circuit. There is agreement in the courts as to the criteria for settlement approval and notice of proposed settlement.

Finally, this case clearly is not one in which the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings, and therefore the exercise of the Supreme Court's supervisory power is unwarranted.

I. The Petition Raises No Important Unsettled Question of Federal Law.

The general criteria for the approval of class action settlements have been enunciated frequently by the federal courts. *See, e.g., Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1975); *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir. 1981); *cert. denied*, 456 U.S. 998 (1982). The requirement of F.R. Civ. P. 23(e) that the district court approve every proposed settlement quite naturally has

resulted in a proliferation of opinions concerning the requisites for approval.

Every factor raised by Petitioners — the adequacy of discovery for objectors; the need for an evidentiary hearing; the adequacy of notice of the proposed settlement; the balancing of the settlement figure against the ultimate likelihood of obtaining a higher figure — has been the subject of extensive discussion in the courts. *See, e.g., In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (discovery); *Saylor v. Lindsey*, 456 F.2d 896 (2d Cir. 1972) (discovery, evidentiary hearing); *Robertson v. National Basketball Association*, 556 F.2d 682 (2d Cir. 1977) (discovery concerning settlement process); *Officers for Justice v. Civil Service Commission*, 688 F.2d 615 (9th Cir. 1982) (notice); *Grunin supra* (notice); *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982) (balancing settlement offer against strength of case); *Grinnell Corp., supra* (balancing).

Furthermore, the standard of appellate review of a trial court's approval of settlement has been addressed repeatedly by the Courts of Appeals. *See, e.g., Grinnell Corp., supra* (abuse of discretion).

Accordingly, the Petition presents no important unsettled questions of federal law. Indeed, in Respondents' view, the Petition presents no questions of law whatsoever, but merely seeks a reapplication of settled principles of law to the circumstances of the instant case.

II. No Conflict Among the Circuits Is Presented By the Petition.

The Petition is totally lacking in any demonstration that the Third Circuit's affirmance of the settlement in this case presents a conflict with the views of any other Circuit. There is no conflict among the Circuits.

While Rule 23(e) is silent with regard to the standards by which a proposed class action settlement is to be

evaluated, the courts have all started with the basic premise that the settlement must be fair, adequate, and reasonable under all the circumstances. *See, e.g., Officers for Justice, supra; Parker v. Anderson,* 667 F.2d 1204 (5th Cir. 1982); *Girsh, supra; TBK Partners, Ltd. v. Western Union Corp.,* 675 F.2d 456 (2d Cir. 1982). In assessing what is fair, adequate, and reasonable, the courts have considered a mix of factors. No single factor is necessarily determinative, as each case is unique. Among the factors which all the circuits agree should be taken into consideration are the following: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See, e.g., Girsh, supra; Grinnell Corp., supra; Parker, supra; Grunin, supra.* Each of these factors has been applied quite flexibly. *See also* H. Newberg, *Newberg on Class Actions* (Second Edition, 1985), §11.42.

There is no conflict among the circuits as to the obligation of the district court to review these various factors. Settlement approval is a matter left to the sound discretion of the trial court, and the trial court must weigh and evaluate these factors as is appropriate in the circumstances of the particular case.

The Courts of Appeals are also in agreement as to the requisites of an adequate notice to class members. The notice must be reasonably calculated to apprise interested parties of the pendency of the actions, inform them of their opportunity to object and must generally describe the terms of the settlement. The notice must be

scrupulously neutral. *See, e.g., In re General Tire and Rubber Co. Securities Litigation*, 726 F.2d 1075 (6th Cir. 1984); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1981); *Grunin, supra*. The Third Circuit decision in this case is completely consistent with the standards enunciated by all other circuits.

Accordingly, the Petition presents no conflict between the Circuits requiring a resolution.

III. The Third Circuit Did Not Sanction A Departure From the Accepted and Usual Course of Judicial Proceedings.

No exercise of this Court's supervisory powers is called for in this case because, as the Third Circuit recognized, the district court treated the settlement of this case in a thorough and altogether appropriate manner.

Respondents believe that the district court properly approved the proposed settlement. Petitioners disagree. However, Petitioners' reargument in this Court of the merits of approval can in no way cast suspicion on the district court's conduct of the settlement process or its ultimate decision regarding settlement.

The proposed settlement was the subject of lengthy briefing and argument before the district court. The Petitioners were allowed a full opportunity to make their objections known. Following hearing, the district court wrote a lengthy opinion discussing and weighing all the factors relevant to the approval or disapproval of settlement. The length and comprehensiveness of the district court's opinion make frivolous any accusation of insufficient attention to the case or failure of the district court to act in the best interests of class members. The Court of Appeals could find no basis for disturbing the judgment of the trial court.

CONCLUSION

Petitioners have failed to demonstrate an important issue of unsettled federal law, a conflict between the Circuits, or a departure from the accepted and usual course of judicial proceedings. Accordingly, for the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DATED: December 13, 1985

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